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In The

Supreme Court of the United States

October Term, 1994

JOHNSON & HIGGINS OF CALIFORNIA, a California Corporation, DONALD F. REEVES, and ROY J. BERTOLDO,

Petitioners,

v.

STEINER CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Respondent Steiner Corporation does not deny that, until the Tenth Circuit's decision here, the law has always been clear that ERISA's anti-cutback provisions forbid an employer from amending a pension plan to reduce or eliminate a beneficiary's retirement-type subsidy or optional form of benefit. Indeed, that has been Steiner's own position throughout the case. The Tenth Circuit's contrary decision creates a circuit conflict in an area that this Court repeatedly has held requires uniformity, throws doubt on the validity of Internal Revenue Service regulations, and exposes pension beneficiaries in the Tenth Circuit to reduction of their retirement benefits.

Steiner never comes close to saying the Tenth Circuit got it right. Instead, it distances itself as much as possible from what the court did. As a result, Steiner's brief in opposition relies on purely technical arguments, never once defending the Tenth Circuit's analysis or holding.

Steiner's brief in opposition therefore only reconfirms the need for this Court's review. This Court should act to correct the Tenth Circuit's error and clarify ERISA law on this crucial issue.

I. THE COURT OF APPEALS' HOLDING THAT LUMP SUM RETIREMENT BENEFITS ARE NOT PROTECTED AGAINST REDUCTION OR ELIMINATION CREATES A CONFLICT WITH THE SIXTH CIRCUIT

Steiner tries to argue that the Sixth Circuit's holding in *Costantino v. TRW, Inc.*, 13 F.3d 969 (6th Cir. 1994) – that

a subsidy paid as a lump sum is a retirement-type subsidy that *cannot* be reduced or eliminated under 29 U.S.C. § 1054(g)(2)(A) – is not really in conflict with the Tenth Circuit's holding here because of two purported factual distinctions. But neither of these "distinctions" is supported by the language of the opinions or the law. *Costantino's* holding is squarely inconsistent with the Tenth Circuit's. This Court should grant certiorari to resolve the split.

Steiner first contends that *Costantino* is distinguishable because the lump sum subsidy at issue there was an early retirement benefit rather than a retirement-type subsidy. Resp. Brief in Opp. at 8. That is just wrong – the subsidy at issue in *Costantino* was a retirement-type subsidy. *Any* payment in excess of the actuarial equivalent of "normal" retirement benefits under a plan is a retirement-type subsidy, whether paid at early retirement or at age 65. *See* Rev. Rul. 85-6, 1985-1 Cum. Bull. 133 (1985) (benefit available before normal retirement age that exceeds actuarial equivalent of normal retirement benefit is retirement-type subsidy); *Ashenbaugh v. Crucible, Inc. 1975 Salaried Retirement Plan*, 854 F.2d 1516, 1521, 1527 (3rd Cir.), *cert. denied*, 490 U.S. 1105 (1989) (subsidized early retirement benefits are retirement-type subsidy); *see also* S. Rep. No. 575, 98th Cong., 2d Sess. 28 (1984), *reprinted at* 1984 U.S. Code Cong. & Admin. News 2547, 2574.

The benefit at issue in *Costantino* was a lump sum offered at early retirement that was more valuable than the actuarial equivalent of normal retirement benefits. It was precisely that subsidy – undeniably a retirement-type

subsidy because it exceeded the "normal" retirement benefit – that the *Costantino* defendant impermissibly eliminated. *Costantino*, 13 F.3d at 977-78. *Costantino* thus holds that a subsidized lump sum benefit payment is a retirement-type subsidy that cannot be reduced or eliminated under Section 1054(g)(2).[1] That directly conflicts with the Tenth Circuit's holding that a lump sum payment can never be a protected retirement-type subsidy.

Steiner also attempts to distinguish *Costantino* by arguing that the Tenth Circuit's holding is limited to subsidies created by applying inflated conversion formulae to nonsubsidized annuities, while the subsidy at issue in *Costantino* was derived by calculating the present value of a subsidized annuity. Resp. Brief in Opp. at 8-9. This "distinction" is directly refuted by the language of the Tenth Circuit's opinion, which plainly says that Steiner's lump sum payment was not a retirement-type subsidy *because it was a lump sum payment*, not because it was derived by an inflated conversion method:

> The lump sum benefit at issue is paid out in full at the time of retirement and does not continue thereafter like a subsidy. We therefore conclude that the lump sum optional benefit is not a retirement-type subsidy.

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[1] Even the Tenth Circuit recognized that *Costantino* involved a retirement-type subsidy; it just read the decision wrong. It cited *Costantino* to support its holding that a "subsidy is a type of benefit specified in the plan as monthly annuities . . . which exceed the annuities for those who retire at a normal retirement age. . . . " App. A at 12-13. But *Costantino* protected a subsidy paid as a lump sum, not an annuity.

App. A at 12. *Costantino*, on the other hand, recognized that a subsidy paid as a lump sum *was* a retirement-type subsidy. The conflict is direct and clear.[2]

As ERISA law now stands, the Sixth and Tenth Circuits tell retirement plans and their beneficiaries two conflicting things: that retirement-type subsidies, including preferred lump sum payments, cannot be reduced in the states comprising the Sixth Circuit; in the states comprising the Tenth Circuit they can. Certiorari is warranted.

II. THE COURT SHOULD REVIEW THE JUDGMENT TO CONFIRM THAT OPTIONAL FORMS OF BENEFIT MAY NOT BE RETROACTIVELY REDUCED

Steiner concedes that the Tenth Circuit "strictly construed" Section 1054(g)(2) – as prohibiting only elimination but not reduction of optional forms of benefit – inconsistently with Treasury Regulation § 1.411(d)-4, which prohibits both elimination and reduction. Resp. Br. in Opp. at 10. Steiner does not even try to defend the Tenth Circuit's "strict construction." Rather, it claims the "strict construction" applies only to the time period before the effective date of the conflicting Treasury Regulation and, therefore, that the Tenth Circuit decision is

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[2] Moreover, Steiner's purported distinctions are so convoluted as to require review even if they were correct. It would be absurd – and unacceptable – for important retirement benefits to turn on the kind of contortions Steiner does in its effort to reconcile the decision below with *Costantino*.

limited to the unique facts of this case.[3] That may be Steiner's wishful thinking, but such a limitation cannot be found in the text of the Tenth Circuit's opinion or in its reasoning.

Nothing in the opinion says or even suggests that the Tenth Circuit's strict construction of § 1054(g)(2) applies only to a past time period or the facts of the case.[4] The language is couched in the present tense:

> According to the explicit language of § 1054(g)(2), since the lump sum is an optional form of benefit, Appellant may be said to impermissibly reduce accrued benefits only if it were to *eliminate* (emphasis in original) the lump sum . . . . Neither ERISA nor the IRC equates the reduction of an optional benefit with a reduction in accrued benefits, and it is only the reduction of accrued benefits that is not permitted by the statutes. (App. A at 13) (emphasis supplied)

And again, when the Tenth Circuit discusses the relationship of Treasury Regulation § 1.411(d)-3(b) to Section 1054(g)(2):

> Rather, it is more appropriate to read this regulation as conforming to the express language of the statute to which it relates. Again, as we have previously determined, only an elimination of the lump sum suffices to reduce accrued benefits for purposes of the statute. Thus, under the

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[3] Steiner completely ignores Revenue Ruling 81-12, 1981-1 Cum. Bull. 228, 229 (1981), which also prohibits reducing an optional form of benefit and on which § 1054(g)(2) is based.

[4] That the Tenth Circuit chose to publish its opinion also indicates it did not believe its views on § 1054(g)(2) are limited to a time period in the past or to the facts of this case.

> regulation only a change to the actuarial factors that effectively eliminates an optional benefit will effectuate an impermissible reduction of accrued benefits. (App. A at 14-15) (emphasis supplied)

Thus, from the face of the opinion, the Tenth Circuit's "strict construction" applies to the present, not just the past, and to any form of optional benefit, not just a subsidized lump sum.

Nor does the Tenth Circuit's reasoning support Steiner's claim that the "strict construction" of § 1054(g)(2) is limited to a past time period or the facts of this case. The Tenth Circuit bases its "strict construction" on what it calls the "explicit" (App. A at 13) and "express" (App. A at 14) language of the statute. That language did not change when the conflicting Treasury Regulation § 1.411(d)-4 became effective. Nothing in the Tenth Circuit opinion suggests that Treasury Regulation § 1.411(d)-4 can override the "explicit" and "express" language of the statute, and give it a radically different meaning. Nor could it. That would be inconsistent with law holding that regulations do not create law, but merely explain existing legislation. *Charbonnet v. United States*, 455 F.2d 1195, 1199 (5th Cir. 1972).

Despite Steiner's assertion that the Tenth Circuit did not hold that Treasury Regulation § 1.411(d)-4 is invalid or wrong, that is the clear import of the Tenth Circuit's reasoning, which refused to accept the specific prohibition in § 1.411(d)-4 against "reducing" an optional form of benefit:

> J&H attempts to depart from the express language of the statutes by looking to Treasury

> Regulation § 1.411(d)-4 . . . . Even if such an interpretation were accurate . . . . (App. A at 13)

And later in its opinion, the Tenth Circuit comes right out and says "it is more appropriate to read" a treasury regulation

> as conforming to the express language of the statute to which it relates. Again, as we have previously determined, only an elimination of the lump sum suffices to reduce accrued benefits for purposes of the statute. (App. A at 14)

According to the language of the opinion, employers in the Tenth Circuit are free under ERISA to reduce optional forms of benefits promised their employees by any amount, just so long as they are not completely eliminated. At the very least, the Tenth Circuit's "strict construction" based on the "explicit" and "express" language of the statute creates severe doubt about the validity of Treasury Regulations §§ 1.411(d)-4 and 1.411(d)-3(b) and puts into question whether optional forms of benefit are protected.

This Court should grant certiorari to make clear what had been clear until the Tenth Circuit decision: that employers cannot reduce promised optional forms of pension benefits.

III. THE CONCEDEDLY ERRONEOUS DECISION CANNOT AVOID REVIEW ON THE THEORY THAT STEINER THINKS IT SHOULD HAVE PREVAILED ON OTHER GROUNDS

Finally, Steiner argues that certiorari should be denied because Steiner believes it could have prevailed

on other grounds. Steiner claims that until the 1985 amendments the lump sum conversion formula was not part of the plan and could have been cut back at will. Resp. Br. in Opp. at 11-12. The District Court rejected this argument, and the Tenth Circuit assumed the District Court was right.

Steiner cites cases holding that an individual misrepresentation in counseling plan participants does not bind the plan if the representation conflicts with the plan's actual terms. But that is not the situation here. Steiner seeks to escape not a slip of the tongue, but its chosen and unbroken practice in paying lump sum benefits it promised its employees for more than a quarter of a century. This practice was memorialized in documents that everyone concerned treated as part of the plan. In these circumstances, the lump sum formula was part of the plan, and the District Court was clearly correct. *See, e.g., Horn v. Berdon, Inc. Defined Benefit Pension Plan*, 938 F.2d 125, 127 (9th Cir. 1991) (document formed part of plan even though not formally labeled as such); *Huber v. Casablanca Indust., Inc.*, 916 F.2d 85, 105-06 (3d Cir. 1990) (document approved by trustees was part of plan even though not executed), *cert. dismissed*, 113 S. Ct. 1070 (1993); *see also Lutheran Med. Center v. Contractors Health Plan*, 25 F.3d 616, 618 (8th Cir. 1994) ("[T]he record shows the Plan has paid benefits to assignees for several years . . . . Because the Plan's actual practice is not in conformity with its strict anti-assignment provision," assignment was valid); *Petrella v. NL Industries*, 529 F. Supp. 1357, 1362 (D.N.J. 1982) (though plan's language did not provide for severance pay, consistent practice of granting it would make it part of plan).

The Tenth Circuit's decision stands for principles that are clearly wrong – so wrong that even Steiner will not defend them on their merits. Even if there existed an alternative factual basis for reaching the Tenth Circuit's result – and none exists here – it would not mitigate either the conflict and uncertainty created in ERISA law by the Tenth Circuit's published opinion or the need to review it.

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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